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No. 75-230

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOE DAMION LOVATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was denied due process by the district court's failure to grant him an evidentiary hearing to determine whether the court should have dismissed the indictment for lack of jurisdiction, after petitioner had alleged that he was forcibly abducted into the jurisdiction.

Following a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of conspiring to sell heroin, in violation of 21 U.S.C. (1964 ed.) 174. He was sentenced to concurrent terms of five years' imprisonment (Pet. 5). The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that in January 1974 a federal narcotics agent stationed in Guadalajara, Mexico, discovered that petitioner, a United States citizen who was known to have several federal arrest warrants outstand-

ing against him, was also present in Guadalajara (C.T. 62-63, 71).[1] The agent thereupon notified Mexican military officials and the American legal attache; the American legal attache in turn notified Mexican immigration officials (C.T. 71-72). Thereafter, on January 30, 1974, petitioner was arrested by the Mexican military officials (C.T. 53); he was then transported by the immigration officials to the United States border at Laredo, Texas, where he was taken into custody by federal agents (C.T. 55, 72).

Petitioner thereafter moved in the district court for an order dismissing the indictment[2] for lack of jurisdiction (Pet. 5; C.T. 49). In an affidavit filed with the district court (Pet. 6-9), petitioner alleged that he had been forcibly abducted by Mexican authorities and subjected to "extreme mental and physical torture" (Pet. 9)[3] prior to being taken into federal custody. Petitioner now contends that he was denied due process by the district court's failure to grant him an evidentiary hearing before denying this motion.

The district court did not abuse its discretion in failing to grant petitioner an evidentiary hearing. Even assuming the truth of petitioner's allegations that jurisdiction was obtained as a result of forcible abduction accompanied by the mistreatment he described, that would not bar the district court from trying him, nor would petitioner be immune from prosecution because of the alleged circumstances of his arrest (*Ker* v. *Illinois,* 119 U.S. 436). As this Court stated in *Frisbie* v. *Collins,* 342 U.S. 519, 522 (footnote omitted):

[1]"C.T." refers to the record on appeal filed with the court of appeals.

[2]In 1970, the grand jury had returned an indictment (C.T. 21-40) in the United States District Court for the District of California, charging petitioner with, *inter alia,* conspiracy to sell heroin (Pet. 2-3).

[3]Petitioner alleged that he was handcuffed, blindfolded, denied food, drink, and access to toilet facilities, and threatened (Pet. 6-9).

> [T]he power of a court to try a person for crime is not impaired by the fact that he ha[s] been brought within the court's jurisdiction by reason of a "forcible abduction." * * * [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[4]

Petitioner relies on the Second Circuit's decision in *United States* v. *Toscanino,* 500 F.2d 267, rehearing *en banc* denied, 504 F.2d 1380, in which the court of appeals, relying in part upon *Rochin* v. *California,* 342 U.S. 165,[5] and *United States* v. *Russell,* 411 U.S. 423, 431-432, held that certain alleged conduct of federal law enforcement officers (including their participation in the defendant's kidnapping from Uruguay, without the knowledge or consent of Uruguayan authorities, and his torture in Brazil) would, if proved, require the district court to dismiss the case. Petitioner's reliance on *Toscanino* is misplaced, since in the instant case the United States agents had merely requested the Mexican authorities to arrest

[4]See also, *e.g., United States* v. *Sobell,* 244 F.2d 520 (C.A. 2), certiorari denied, 355 U.S. 873; *United States* v. *Sherwood,* 435 F.2d 867 (C.A. 10), certiorari denied, 402 U.S. 909; *United States* v. *Cotten,* 471 F.2d 744 (C.A. 9), certiorari denied, 411 U.S. 936; *United States* v. *Vicars,* 467 F.2d 452 (C.A. 5), certiorari denied, 410 U.S. 967. Cf. *Johnson* v. *Louisiana,* 406 U.S. 356, 365; *Lamb* v. *Beto,* 423 F.2d 85 (C.A. 5), certiorari denied, 400 U.S. 846.

[5]*Rochin* involved only the question whether evidence seized in violation of the Constitution was admissible in a criminal trial; it did not question the court's authority to try the victims of such unlawful police conduct. See *United States ex rel. Luja* v. *Gengler,* 510 F.2d 62, 68, n. 9 (C.A. 2), certiorari denied, 421 U.S. 1001.

petitioner and expel him in accord with their own procedures; there was no direct allegation that United States agents had participated in, or even knew of, the alleged mistreatment associated with his expulsion. "[W]here the United States Government plays no direct or substantial role in the misconduct and the foreign police have acted not as United States agents but merely on behalf of their own government, the imposition of a penalty would only deter United States representatives from making a lawful request for the defendant and would not deter any illegal conduct." *United States* v. *Lira*, 515 F.2d 68, 71 (C.A. 2), certiorari denied October 6, 1975, No. 74-6501.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[6]Moreover, as the Second Circuit has subsequently noted, *Toscanino* is applicable only in the limited situation where the accused is brought before the court by means of "cruel, inhuman and outrageous" government conduct. *United States ex rel. Lujan* v. *Gengler*, *supra*, 510 F.2d at 65-66. Here, however, the deprivations alleged by petitioner are far less significant than those claimed in *Toscanino*, *supra*. As the court below correctly observed (Pet. App. 2-3):

> When [petitioner's] affidavit is stripped of its opinions, suspicions, and conclusions, his allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien.

See also *United States* v. *Herrera*, 504 F.2d 859 (C.A. 5); *In re Chan Kam-Shu*, 477 F.2d 333, 338, n. 10 (C.A. 5), certiorari denied, 414 U.S. 847; *United States* v. *Vicars*, 467 F.2d 452, 455-456 (C.A. 5), certiorari denied, 410 U.S. 967; *United States ex rel. Calhoun* v. *Twomey*, 454 F.2d 326, 328 (C.A. 7); *United States* v. *Cotten*, 471 F.2d 744, 748 (C.A. 9), certiorari denied, 411 U.S. 936.